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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/541,560	07/06/2005	Stefan Breuer	PHDE030002US	5826
38107 7590 02/24/2009 PHILIPS INTELLECTUAL PROPERTY & STANDARDS 595 MINER ROAD CLEVELAND, OH 44143			EXAMINER NAQI, SHARICK	
			ART UNIT 3769	PAPER NUMBER
			MAIL DATE 02/24/2009	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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PHILIPS INTELLECTUAL PROPERTY & STANDARDS
595 MINER ROAD
CLEVELAND OH 44143

In re Application of:

BREUER, STEFAN et al

Serial No.: 10/541,560

Filed: July 6, 2005

Docket: PHDE030002US

Title: METHOD AND APPARATUS FOR
COMMUNICATING WITH A MEDICAL
DEVICE

DECISION ON PETITION TO
WITHDRAW FINALITY and
ENTRY OF AFTER FINAL
AMENDMENT

This is a decision on the petition filed on Feb. 12, 2009 to withdraw the finality of the Office action of November 12, 2008 and enter the Rule 116 amendment filed January 9, 2009. This decision is being considered pursuant to 37 CFR 1.181. No fee is required under this section.

The petition is DISMISSED.

Applicable Rules or Statutes

37 CFR 1.181(f):

The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable.

Review of the record shows that the instant petition was filed more than two months after the mailing date of the final Office action of November 12, 2008. Pursuant to 37 CFR 1.181(f), the petition is not timely filed since the petition was not filed within two months of the action complained of. As the petition was not timely filed, the relief requested will not be granted. The finality of the last Office action stands.

In the petition, petitioner opines that the amendment filed after the final on January 9, 2009 should be entered because the finality was premature in the final Office action of November 12, 2008. Since the finality of the last Office action stands, a review of the examiner's refusal to enter the amendment after final filed on January 9, 2009 in the Advisory Action must be made. In the Advisory Action, the examiner refused to enter the amendment because the examiner stated in the advisory action that the amended claims 3, 20 and 21, and the addition of new claims 22-27 raise new issues that require further search and/or consideration. The examiner

also stated that independent claim 3, the newly added limitation that the device functions by "in the communication mode, digitally transmitting a software update from the connected external device into the medical device via the analog/digital interface and digitally transmitting data from the medical device to the external device via the analog/digital interface" was not previously claimed and raises a new issue. The independent claim 20, the newly added limitation of "a processing unit that detects whether digital or analog data is received and switches the interface..." was not previously claimed and presents a new issue. Finally the newly added independent claim 25, at least the limitation of "an external digital device configured to digitally transmit software updates from the external device to the medical device and to digitally receive data from the medical device via an external digital device plug" was not previously claimed and presents a new issue. Therefore, the examiner did not enter the Rule 116 amendment filed on January 9, 2009.

Discussion and Analysis

Relevant portions of 37 CFR §1.116 Amendments and affidavits or other evidence after final action and prior to appeal, state:

(a) An amendment after final action must comply with 37 CFR 1.114 or this section. (b) After a final rejection or other final action (37 CFR 1.113) in an application or in an ex parte reexamination filed under 37 CFR 1.510, or an action closing prosecution (37 CFR 1.949) in an inter partes reexamination filed under 37 CFR 1.913, but before or on the same date of filing an appeal (37 CFR 41.31 or 37 CFR 41.61 of this title): (1) An amendment may be made canceling claims or complying with any requirement of form expressly set forth in a previous Office action; (2) An amendment presenting rejected claims in better form for consideration on appeal may be admitted; or (3) An amendment touching the merits of the application or patent under reexamination may be admitted upon a showing of good and sufficient reasons why the amendment is necessary and was not earlier presented. Furthermore, entry of amendments after final rejection is not a matter of right (see 37 CFR 1.116).

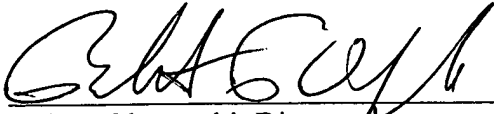
In order to determine whether or not that the amended claims and newly added claim 25 raise new issues, which require further consideration and/or search, a comparison of amended claims and the newly added claims of January 9, 2009 and the existing claims 3, 8, 10-17, 20 and 21 of October 17, 2008 under final rejection must be made. The difference is the addition of the limitations as amended and/or added in claims 3, 20 and 25 which indeed require further consideration and/or search. Such added limitations in claims 3, 20 and 25 clearly contain new issues which were not considered by the examiner in the final Office action of November 12, 2008. A review of the record shows that the examiner was in compliance with proper examining practice as set forth in MPEP 714.13. Therefore, the amendment after final filed on January 9, 2009 is not in compliance with 37 CFR §1.116. The examiner's advisory action in refusing to admit the amendment of January 9, 2009 is proper.

Conclusion

For the foregoing reasons, the relief sought by petitioner requesting withdraw of the finality of the Office action of November 12, 2008 and entry of the amendment after final filed January 9, 2009 will not be granted. The application is being forwarded to the Supervisory Patent Examiner of Art Unit 3769 for waiting applicant's notice of appeal.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision, 37 CFR 1.181(f). No extension of time under 37 CFR 1.136(a) is permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181". Any inquiry regarding this decision should be directed to Henry Yuen, Special Programs Examiner, at (571) 272-3468.

PETITION DISMISSED.

A handwritten signature in black ink, appearing to read "Robert Olszewski", is written over a horizontal line.

Robert Olszewski, Director
Technology Center 3700